VOLUME 54

49768

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EDWARD A SMITH,
Defendant-Appellant.

54 I.A.2 73

APPEAL FROM CRIMINAL COURT,
COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Defendant Edward A. Smith, in two separate indictments, was charged with robbery and attempted murder. After the indictments were consolidated for trial, defendant waived a jury, and,pursuant to hearing, the court found him guilty of both offenses. After his post-trial motions were overruled, defendant was sentenced to the State penitentiary for a term of not less than five nor more than twenty years on each indictment, the sentences to run concurrently. Defendant appealed to the Supreme Court, which transferred the cause to this court.

The robbery and attempted murder occurred March 12, 1962 in a store on the south side of Chicago. The owner, Arnold Johnsen, and an employee, Donald Lofgren, were alone in the store when a stranger walked in and announced a hold-up. In the course of the robbery, the police arrived and the stranger fled by the back door. Lofgren gave the first officer arriving on the scene a description of the robber while the other officers left in the direction the robber had taken. Within a block, one of the officers saw a man who fitted the description of the robber. The pursued man shot at the officer and struck his buckle with a bullet; he then began to run, with the officer in pursuit and firing, but he was unable to apprehend the man. The following day Lofgren identified defendant as the robber from a picture in a book of "mug" shots, and two days later defendant was picked up and charged with

robbery and attempted murder. Immediately following the robbery, Officer Jordan went to the store and took a description of the robber from Lofgren; this report was in addition to the one Lofgren gave to the first officer on the scene.

As the principal ground for reversal it is urged that the court erred in refusing to order the State to give defendant's counsel Officer Jordan's report which contained a description given by Lofgren of the robber. The report made by Lofgren to Officer Jordan was not requested when Lofgren was on the stand but, rather, when Officer Jordan was testifying. The purpose of requesting the report was to afford a basis for impeachment on the question of identification of the robber. The State contends that defendant suffered no prejudice by the trial judge's refusal to order Officer Jordan's report to be turned over to defense counsel for that purpose since the trial judge expressly stated that Officer Jordan's testimony was valueless and that his impeachment could not have affected the finding of guilt, and the State argues that the doctrine of harmless error is applicable to cases involving the production of documents for impeachment purposes. However, we think that defense counsel's request for Officer Jordan's report when he was on the stand should have been allowed, although Lofgren's impeachment could not have been initiated during the cross-examination of Officer Jordan. Officer Jordan's report should have been produced so that the officer could have identified it and testified as to who gave him the information which was the basis of his report. If defense counsel believed that Lofgren's testimony could be impeached, Lofgren could have been recalled to the stand. It would undoubtedly have been more orderly to ask for the report when Lofgren was testifying, and then have Officer Jordan identify the report later, but defense counsel should not have been foreclosed from receiving the report after Lofgren

was no longer on the stand. It may well be that defense counsel feared or anticipated that Lofgren would deny giving Officer Jordan any information, and accordingly he may have considered it better strategy to have the report identified first by Officer Jordan and later recall Lofgren to the stand for impeachment purposes. Under the authority of People v. Wolff, 19 Ill.2d 318, 327, 167 N.E.2d 197 (1960), the trial judge should have ordered the document delivered to the accused for his inspection, for impeachment purposes. This document was important to counsel's defense of the case, and the judge's failure to make the report available to defendant constitutes prejudicial error.

As further ground for reversal it is urged that defendant failed to receive a fair and impartial trial, but in view of our conclusion as to the principal ground urged for reversal we do not consider it necessary to discuss any of the points urged, except one. Defense counsel was told by the trial judge that he had heard a sufficient number of alibi witnesses when counsel sought to call another witness. There is nothing to indicate that the witness was being called to the stand to unduly prolong the trial. Although trial judges are given wide discretion in the conduct of a trial (People v. Herbert, 361 Ill. 64, 72, 196 N.E. 821 (1935)), we believe that there was an abuse of discretion in this instance. In stating that he thought defendant had a sufficient number of alibi witnesses, the trial judge was prejudicing defense counsel's presentation of his case. People v. Arnold, 248 Ill. 169, 178, 93 N.E. 786 (1911). It was prejudicial error not to allow the additional witness to testify.

For the reasons indicated the judgments entered against defendant are reversed, and the cause is remanded for a new trial.

JUDGMENTS REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

BURKE, P.J., and BRYANT, J., concur.

49590

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. GEORGE SOLOMONSON, Defendant-Appellant.	)	54 I.A.2d 211 APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF CIRCUIT COURT, COOK COUNTY, ILLINOIS

MR. PRESIDING JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

Defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor. (Ill. Rev. Stat., ch. 95 1/2, § 144.) He was tried by the court without a jury, found guilty and fined $100, which fine was suspended. It is defendant's contention that the State failed to prove beyond a reasonable doubt that he had been under the influence of intoxicating liquor.

Defendant testified that on the morning of September 25, 1963, he drove to Mary Hutul's tavern, arriving there at 10:30 A.M. He said that he consumed two drinks of Canadian Club and Ginger Ale, made two or three business calls and took down some notes on a piece of paper.

He then left the tavern about 12:30 P.M. and went directly to his car, a 1963 Buick. According to his description, the car parked in front of him was 24 inches away from his while the car parked in back was separated from his car by something more than the distance of a residential driveway. As he proceeded to back away from the car in front of him, his gas pedal became stuck, causing him to move backwards into the vehicle behind. At this point he testified: "I was a little confused and I was trying to get the car in neutral; instead I got it into low." The automatic transmission on the car necessitated going through the forward gears in moving the lever from reverse to neutral. The car shot forward, striking the car in front of him. Again he was "confused," backed the car "a little bit" and again drove forward, striking the car in front. In total, nine parked cars were damaged by the chain reaction. Defendant testified that at all times the accelerator was stuck in a depressed position, but at no time did he say

that he attempted to apply the brakes. The reason he gave for not stopping the car sooner was that he became confused by the stuck gas pedal.

Two weeks before the accident he had similar trouble with the accelerator and took the car to a garage to have it fixed. A garage bill was introduced into evidence to show that the carburetor and faulty pedal were adjusted at that time.

After the accident the defendant went back to the tavern in order to wash off some blood from his forehead which received a large bump and a laceration. An officer who first investigated the accident met the defendant in the tavern and the two of them went to the Edgewater Hospital where the defendant was treated for his injuries.

George Washington, the police officer, testified at the trial that he investigated the accident shortly after the defendant went to the hospital. There is a slight discrepancy between his and the defendant's representation of the distance between the defendant's car and the car immediately behind his, but this variance is not material to the disposition of the case. Officer Washington testified further that he then went to the hospital and interviewed the defendant, who admitted driving the car but denied knowing how the accident happened; that at this time the defendant told the officer that he had been drinking in the tavern for an hour and a half before the accident. (In that statement he did not limit the number of drinks to two, as he did in his testimony at the trial.) The officer then took the defendant to a district station where he made a visual test for intoxication.* As a

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* The results of the test, as testified to by Washington, were as follows: "Breath was strong from the odor of alcohol; color of face was pale; his attitude was polite and cooperative; unusual actions, none; his eyes were slightly bloodshot and his pupils contracted to lights; his balance was fair and his walk was swaying and his turning was swaying; uncertain on the finger-to-nose test on the right and sure on the left; picking up coins was sure and the speech was fair."

result of his observations from the test, the police officer formed the opinion that the defendant was under the influence of alcohol. It is noteworthy that the test was administered some two and one half hours after the accident.

Witness Strid, a personal friend of the defendant, was called by him to the police station in order to post bail. He testified that, based upon his experience of seeing persons in the service who were under the influence of alcohol, and on his observation of defendant in the station, it was his opinion that defendant was not under the influence of intoxicating beverages. (Mr. Strid saw the defendant a short time after the visual test was taken.)

When a person is accused of driving an automobile while under the influence of intoxicating liquor, the manner in which he drives his car is relevant to the issue of his being under the influence of intoxicants. People v. Evans, 290 Ill. App. 75, 78. It is defendant's contention, however, that the manner in which the accident occurred is equally consistent with a conclusion one way or the other on this issue. If this were true, the presumption of innocence must prevail because these are criminal proceedings in which proof of guilt must be beyond a reasonable doubt. However, even accepting defendant's testimony that the gas pedal was stuck does not explain why the car was put in and out of gear several times and allowed to collide three times with other vehicles while no attempt was made to apply the brakes or take other reasonable measures to stop the car. In this regard it should be borne in mind that under the language of the statute it is not necessary for the State to prove that defendant was intoxicated in the ordinary and rather extreme meaning of that word. It must only be shown that the driving of the car, admittedly done by this defendant, was while he was under the influence of intoxicating liquor.

The defendant contends, however, that the visual examination administered by the police officer was inconclusive because the results

are equally consistent with those expected to be found in a man who was being treated for low blood pressure and who had just received a blow on the forehead. Admitting for purposes of argument that nearly every observation under the test is consonant with some cause other than intoxication, nevertheless, the strong odor of liquor on defendant's breath some two hours after the accident, the defendant's admission of drinking before the accident and the circumstances of the accident itself were certainly sufficient grounds on which the police officer (who had handled two or three hundred similar cases) could have based his opinion.

Finally, the defendant attempted to impeach the credibility of the police officer's opinion by the testimony of Mr. Strid. Without discussing the particular lay qualifications of this witness, we may simply refer to People v. Cool, 26 Ill. 2d 255, 258, where it is stated that, "Where the guilt or innocence of the defendant depends upon the credibility of conflicting testimony, the finding of the trial court will not be disturbed."

Having examined all the evidence in this case, we see no basis for overturning the decision of the trial court.

AFFIRMED.

DRUCKER and McCORMICK, JJ., concur.

Abstract only.

337

Automobiles and Motor Vehicles, § 356 - noncooperation with insurer.

Where insurer under automobile liability policy showed only its inability to find insured on day preceding trial of injury action against insured defended by insurer alone, and insurer had made no effort to keep in contact with insured during year from accident until trial, and existence of affirmative duty of insured to keep in contact with insurer could not be determined under evidence, noncooperation of insured during trial relieving insurer of obligation to pay judgment was not established.

49337

OVELL TERRELL, For the Use of JOE PAYNE, Plaintiff-Appellee, v. MULTI-STATE INTER-INSURANCE EXCHANGE, Defendant-Appellant.	)	APPEAL FROM THE MUNICIPAL COURT OF EVANSTON, ILLINOIS

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal by the Multi-State Inter-Insurance Exchange from a judgment entered against it in the Municipal Court of Evanston on July 9, 1963, in the amount of $2,500.00 and costs.

The garnishee-appellant issued a policy to one Ovell Terrell for liability resulting from the operation of his automobile. Terrell was involved in an automobile accident on September 30, 1961, and the driver of the other car, Joe Payne, sued for the damages sustained as a result of Terrell's negligence. A trial was had on the matter in the Municipal Court of Evanston, and a judgment was entered in favor of Payne and against Terrell in the sum of $2,500.00. Terrell was not present at this trial, and the insurance company defended the action in his absence.

When Payne sought to collect the judgment from the insurance company, the company denied liability, claiming that Terrell had breached the requirements of his policy that he cooperate in the defense of any action brought against him, and that such a breach having taken place, the company did not have to pay. The appellant admitted that it had a policy in effect covering Terrell and that the policy covered the amount of the judgment. Judgment was entered in favor of Payne in the court below, and it is from this judgment that the Multi-State Inter-Insurance Exchange appeals.

The appellant has urged two points before this court: first, that the cooperation of the insured is a condition precedent to the liability of the insurance company, and second, that prejudice to the insurer is presumed from the failure of the insured to attend the trial. We feel that the appellant has not extablished its case.

The record below does not show that the insured would not cooperate with the appellant insurance company. All that is shown is that the day before the suit for personal injuries resulting from the automobile accident was to go to trial, the appellant tried to contact the insured and could not find him. From this the appellant would have us believe that the insured was hiding and if found would not cooperate with the company. We see no basis in the record for drawing such an assumption. The record indicates that during the year from the accident until the case came to trial, the appellant made no effort to keep in touch with the insured.

The principals governing this case were laid out in Kankakee Auto Leasing Co. v. Hemphill, 21 Ill. App.2d 179, 157 N.E.2d 678 (1959), where the court said:

> "A garnishment proceeding must be based on a claim on which the judgment debtor, himself, could have maintained an action against the garnishee. (Zimek v. Illinois National Casualty Co., 370 Ill. 572, 576.) A policy of insurance is a contract between insurer and insured. Refusal of co-operation by the insured, in the defense of an action against him for a cause covered by the policy, is a breach sufficient to prevent recovery on the insurance policy by either the insured or anyone for his use. (Schneider v. Autoist Mutual Ins. Co., 346 Ill. 137, 140.) As a reviewing court, we will accept the findings of the trial judge upon questions of fact, unless such findings are clearly and palpably erroneous. 2 I.L.P., Appeal and Error, par. 786; Western & Southern Life Ins. Co. v. Brueggeman, 323 Ill. App. 173.
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> "It was incumbent upon the insurer to prove that it and its attorneys acted in good faith, and that Hemphill's failure to appear in court was due to a refusal to co-operate. The question of good faith is not limited to the insured but includes good faith on behalf of the insurer, and it was for the trial court to make that determination as a question of fact. Panczko for Use of Enright v. Eagle Indemnity Co., 346 Ill. App. 144."

The appellants have brought forth no evidence that the insured would not cooperate except the fact that when they sought to contact him the day before the trial, they could not find him. In the case quoted above, the insurance company sent the insured registered letters informing him of the coming trial, and the return receipts were signed with the insured's name, but even there the court held that the company should have tried to ascertain whether the insured had in fact received the letters. In this case, the appellant did not do even this much to keep in touch with its insured.

The appellant has also failed to put the insurance contract into evidence, or even to have the clause the insured is claimed to have violated read into the evidence. The court is, therefore, unable to determine whether or not the insured might have had an affirmative duty to keep in contact with the appellant or not. In the absence of such proof, we feel that the appellant has failed to prove its charge that the insured had refused to cooperate. The appellant must give us more proof than its say so. Gass v. Carducci, _____Ill. App.2d _____, _____N.E.2d _____, Gen. Number 49424, (October 27, 1964.)

Having failed to establish non-cooperation, the question of whether or not the appellant was prejudiced by the failure of the insured to attend the trial is not before the court. The judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and FRIEND, J., concur.

49445

54 I.A.2371

CLARENCE TRAPP and PATRICIA TRAPP,

Plaintiffs-Appellees,

v.

STATE OF ILLINOIS, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF NARCOTIC CONTROL, et al.,

Defendants-Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Plaintiffs Clarence and Patricia Trapp filed an action of replevin in the Municipal Court of Chicago to recover from defendants certain narcotics and a revolver, alleging that their seizure by defendants was improper.

The case arises out of the arrest of plaintiffs for the unlawful possession of narcotic drugs (Ill. Rev. Stat. 1963, ch. 38, §§ 22--1 - 22--49). Plaintiffs were arrested because they purchased narcotics on post-dated prescriptions after the death of the prescribing physician, who had prescribed the drugs for plaintiffs in good faith. The superintendent of the narcotic control division, who is authorized by statute to hold hearings to determine the validity of the seizure of narcotics (Ill. Rev. Stat. 1963, § 22--29a), found that plaintiffs unlawfully possessed the narcotics in question and that therefore their seizure was proper. The division superintendent also found that the automobile in which plaintiffs were arrested, a 1962 Ford Thunderbird, Serial No. 2Y87Z155562, was used for the unlawful transportation of narcotics and that therefore the Thunderbird was likewise lawfully seized (Ill. Rev. Stat. 1963, ch. 38, § 22--26). Plaintiffs appealed the division's decision to the Circuit Court of Cook County which entered an order setting aside the division's decision that the Thunderbird was lawfully seized and directing the return of the Thunderbird to plaintiffs; on appeal this court affirmed the order of the Circuit Court

(1962 Ford Thunderbird v. Narcotic Control, 49 Ill. App.2d 8, 198 N.E.2d 155 (1964)).

Before the Circuit Court had entered its order on August 12, 1963 plaintiffs had filed their suit for a writ of replevin in the Municipal Court for recovery of the narcotics and the revolver. On August 21, 1963 the division filed a notice of appeal, praecipe for record, and a petition for supersedeas with respect to the order in the 1962 Ford Thunderbird case. Defendants contended that the Municipal Court should dismiss plaintiffs' replevin suit since the question at issue in that suit was also the sole issue in the Thunderbird litigation then pending before the Supreme Court of Illinois. (The Supreme Court subsequently transferred the case to the Appellate Court for review.) However, the Municipal Court, on September 9, 1963, ordered the narcotics and the revolver returned to plaintiffs. Defendants thereupon moved the court to vacate the judgment order on the grounds that the Municipal Court was without jurisdiction in the premises, and that the decision was contrary to law. That motion was not granted, whereupon defendants perfected this appeal. Plaintiffs have not filed an appearance or a brief in this court.

With respect to review of an administrative decision of the narcotic control division the Uniform Narcotic Drug Act provides in part (Ill. Rev. Stat. 1963, ch. 38, § 22--31):

> " . . . . The Circuit or Superior Court of the county wherein the hearing is held has power to review all final administrative decisions of the Division in administering the provisions of Sections 27, 28 and 29 of this Act.
> . . . .
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> " . . . .
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> " . . . . <u>The remedy herein provided for appeal shall be exclusive.</u>" (Emphasis added.)

By filing suit for a writ of replevin for the narcotics and the revolver in the Municipal Court plaintiffs failed to follow the procedure set

forth in the above section. In order to obtain a review of the final decision of the division the only remedy open to plaintiffs was an appeal to the Circuit or Superior Court of Cook County. Under the statute the Circuit or Superior Court had exclusive jurisdiction to review all final administrative decisions, and accordingly the Municipal Court should have dismissed the cause.

For the reasons indicated the judgment is reversed, and the cause is remanded to the Circuit Court with directions to enter an order dismissing the case.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J., and BRYANT, J., concur.

49705

WILLIAM JURNEY, Plaintiff-Appellant, v. JOSEPH LUBEZNIK, also known as JOSEPH LUBCZNICK or also known as JOSEPH LUBEZNICK, Defendant-Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This was an action to recover damages for injuries sustained by plaintiff while attempting to extinguish a fire in a hotel owned and operated by defendant. The jury returned a verdict for the defendant and judgment was entered on the verdict. Plaintiff appeals. The only point advanced by plaintiff is that the court erred in submitting a defendant's instruction which, plaintiff contends, erroneously assumed that evidence existed that plaintiff was intoxicated at the time of the fire.

We do not deem it necessary to discuss this case at length as the defendant has failed to file a brief as required by Supreme Court Rule 39.

On March 24, 1960, a fire started in a room in defendant's hotel, caused by an improvised lamp shade made of newspaper constructed by a tenant covering the ceiling-light bulb. There was evidence at trial that defendant had knowledge of such practices by his tenants, resulting from his failure to provide proper shades. Plaintiff, a tenant in the hotel, received serious burns to his hands and legs when attempting to extinguish the flames. The fire did not start in his room.

Defendant's Instruction D-6 to which plaintiff objects as prejudicial reads as follows:

> "Whether or not a person involved in the occurrence was intoxicated at the time is a proper question for the jury to consider together with other facts and circumstances in evidence in determining whether or not he was contributorily negligent. Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person."

The record is devoid of any evidence as to whether or not plaintiff was intoxicated at the time of the fire. It is well established that it is prejudicial error to give an instruction advising the jury that if a certain fact exists then a certain rule of law applies, if there is no evidence of that fact. Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154. "Such instructions must be based upon evidence in the case, and a statement of a hypothesis of fact virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence the instruction is misleading." Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 162. See also Woods v. Chicago, B. & Q. R.R. Co., 306 Ill. 217.

This is a negligence action; there is enough evidence in the record which would warrant a jury to find defendant guilty of negligence; the question of contributory negligence was therefore a material issue. Since the instruction in question deals with contributory negligence on the ground of intoxication, and since there was no evidence of intoxication at the time of the fire, it was error to give the instruction.

The judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

FRIEND, J., and BRYANT, J., concur.

49436

LILLIE HUBBARD,

Plaintiff-Appellee,

v.

CHECKER TAXI COMPANY, a Corporation, NOLAN ALLEN and ROBERT MALONE,

Defendants.

CHECKER TAXI COMPANY, a Corporation, and NOLAN ALLEN,

Defendants-Appellants.

54 I.A.2 392

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the circuit court of Cook County taken by Checker Taxi Company, a corporation, and Nolan Allen, the driver of the cab, from a judgment entered in favor of the plaintiff in the amount of $5,000.00. The first point urged by the defendants is that the competent evidence establishes that there was no act of commission or omission on the part of the defendants, Checker Taxi Company and Nolan Allen, that proximately caused the accident.

The testimony as to liability was the following:

Plaintiff testified that on May 30, 1956 she was a passenger in a Checker taxi which was proceeding east on Garfield Boulevard or 55th Street toward South Parkway in Chicago, Illinois. That as they approached South Parkway the traffic light for eastbound traffic was green. That she saw one car in the lane to the left of the cab, which was the curb lane. (By the curb lane is meant a curb on the median strip.) That it was a little ahead of the cab in the left lane, and it was turning left. That there was also a car

along side of the cab in the left lane. That the cab turned suddenly from the middle lane without stopping and hit the car along side and the right side of the car ahead. That the traffic light did not change color as they approached South Parkway - it was always green. That the cab was traveling in the middle lane of Garfield Boulevard and cars were passing the cab on both the right and the left. That the front of the car next to them was along side the door where she was sitting, and none of the vehicles came to a stop before the occurrence.

On behalf of the defendants, Angelo De Pietro testified that on May 30, 1956, about 9:30 P.M. he was traveling east on Garfield Boulevard, and, when he came to the intersection of South Parkway and Garfield, he stopped in the extreme right-hand lane for the red light. That there were three lanes on Garfield at South Parkway. (By three lanes is meant three lanes for eastbound traffic.) That a Checker cab was in the center lane to his left about halfway up along side of him. That the cab was mainly in the center lane and partially in the left lane, which was entirely open except for a car just in front of the cab. That there was an accident involving the cab, the car in the left lane just in front of the cab and a third car which after the accident was along side of the cab to its left. That the cab was standing still before the accident happened, and when he got out of his car the cab was in a different position; because of the impact, it had been pushed up into the intersection. That the first time he saw the car along side of the cab to its left was after the collision.

Earl Gray, another witness called on behalf of the

defendants, stated that he is now employed by the Yellow Cab Company but on May 30, 1956, he was working for a private company. On that date, about 9:30 in the evening, he was coming from work after dropping his cab off and was driving his own automobile, a 1950 Chrysler, near Garfield Boulevard and South Parkway. That as he approached South Parkway on Garfield the light turned red and he stopped. That he was in the left lane to make a left turn onto South Parkway, and there was only one lane to turn left from that point. That he guessed he had been there a second waiting for the light to change when a cab came up and stopped about five feet behind him. That the cab wasn't directly behind him but was sort of to his right. That when he looked in the rear view mirror he could see the lane behind him, and it was not clear; the cab which he could see behind him partially obstructed his view. That he had his directional signal on, and he did not see a directional signal on the cab. That he had approached the light at the same time as the cab, so that when the light changed automatically the cab had to stop because they approached the light at almost the same time. That he was watching the red light when he heard tires screeching, and he looked in his mirror and saw the headlights of a Buick car almost upon the cab approaching fast. That the Buick struck the cab, and after the impact the hood from the Buick flew over his car; the cab bumped his car and knocked it into the middle of South Parkway. That after the accident he saw the Buick along the left curb. That the cab was at the side of the Buick and the Buick was between the left side of the cab and the left curb.

The evidence deposition of Nolan Allen, the driver of the

cab in which the plaintiff was riding, was read to the jury. He testified that on May 30, 1956, he was a cab driver for defendant cab company and was involved in a collision on Garfield Boulevard at South Parkway in Chicago. That the accident happened about 9:00 o'clock at night. That the weather was clear and the streets were dry. That plaintiff was a passenger in his cab, and he was proceeding eastbound on Garfield Boulevard which has three or four lanes for eastbound traffic with a parkway or separation, and then the same number of lanes for westbound traffic. That his car was standing at the time of the collision. That as he had pulled up to South Parkway, eastbound on Garfield Boulevard, the red light was already on and it was not changing. That he was sitting there waiting for the red light to change. That his car was about two or three feet behind and to the right of an old model two-toned Chrysler which was stopped next to the parkway. That when he stopped behind the Chrysler the left side of his car was a little bit over behind the Chrysler's right rear fender and bumper, and from the left side of his car to the curb there was an open space that was less than a car's width. That he had been sitting at the light for about thirty seconds with his turn indicator on ready to make a turn on South Parkway to go north when the collision occurred. That the light was still red at this time. That the Buick hit his cab and pushed it to the right, forcing its way between the cab and the curb. That the collision knocked his cab into the car in front of him, the front side of the cab hitting the right rear of the car in front. That, before the collision, he did not see the Buick, which came up from behind and struck him. That after the collision he

helped the lady (plaintiff) from the floor of the cab and asked her if she was hurt to which she replied, "No." That after the accident the car that hit his cab was nearly even with his car on the left side, and it was between his car and the parkway. Thatthe driver of the car that struck his cab from behind talked incoherently - staggering and his eyes looked bleary. That when the witness talked to the driver of the car that struck his cab he was close enough to smell his breath - he smelled liquor on his breath - alcohol.

The other defendant, Robert Malone, who was the driver of the Buick, was dismissed as a defendant in the complaint on motion of the plaintiff. However, a verdict was returned in favor of the Checker Taxi Company on its counterclaim against Robert Malone, for damages to the Checker cab in the amount of $278.28. Judgment was entered against the defendant, Robert Malone, for that amount.

A number of pictures taken immediately after the accident, and while the cars were at the scene of the accident, were offered by the defendant and admitted in evidence and will be commented on later in this opinion.

Under defendant s' first point they have argued that it was error for the court not to have granted their motion for judgment notwithstanding the verdict, and also, that the verdict was against the manifest weight of the evidence. As to the point that the trial court should have granted defendants' motion for judgment notwithstanding the verdict, the law in Illinois is quite clear.

> "A judgment notwithstanding the verdict may be entered only when under all the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, and the single

> question before the court under such circumstances is, whether there is in the record any evidence which standing alone and taken with all legitimate inferences most favorable to the party resisting the motion would tend to prove the material elements of the case, and if the evidence makes out a prima facie case sufficient in itself to go to the jury, the motion is required to be denied and plaintiff is entitled to the benefit of the evidence favorable to him, including evidence introduced by defendant. 5 Ill. App. 2d 417, 422, and cases cited therein.

In Moss v. Wagner, 27 Ill. 2d 551, 554, the court said:

> "The only question that is raised by the defendant's motion for judgment notwithstanding the verdict is whether there is any evidence which, taken in its aspects most favorable to the plaintiff, proved or tended to prove the cause of action."

In Hickey v. Chicago Transit Authority, 52 Ill. App. 2d 132, on page 136 the court said:

> "On such a motion the court cannot consider any conflict in the evidence nor its weight or preponderance nor the credibility of witnesses, but must take that evidence as true which is most favorable to plaintiff's cause of action. Greenlee v. John G. Shedd Aquarium, 31 Ill. App. 2d 402, 176 N.E.2d 684, and cases there cited."

In the case before us, the plaintiff's testimony standing alone and taken to be true, together with all reasonable inferences most favorable to the plaintiff to be drawn therefrom, could have justified a verdict of the jury against the defendants.

The plaintiff was a fare-paying passenger in defendant's taxi cab and defendant taxi cab company had a duty imposed upon it by law to use the highest degree of care consistent with the mode of conveyance used and operation of its business as a common carrier. Baltes v. Checker Taxi Co., 27 Ill. App.. 2d 298, 169 N.E.2d 596, 597.

The testimony of the plaintiff standing alone in this case would establish negligence on the part of the defendants and a violation of the duty imposed upon the defendants to use

the highest degree of care consistent with the mode of conveyance. The court properly denied defendants' motion for judgment notwithstanding the verdict.

We now come to the question as to whether under the facts in this case the judgment is against the manifest weight of the evidence.

The defendants produced testimony of Nolan Allen, driver of the cab, the testimony of Angelo De Pietro, a disinterested witness and the testimony of Earl Gray, who is now employed by the Yellow Cab Company, but who on May 30, 1956 was working for a private cab company. All three of these witnesses testified that as the Checker cab approached South Parkway on Garfield the light turned red and the Checker cab came to a stop. The uncontradicted evidence showed that the 1950 Chrysler automobile, driven by Gray, was in the left lane ready to make a left turn on South Parkway. De Pietro testified that his car was along the right curb and was stopped at the time of the accident. The preponderance of the evidence clearly showed that the Chrysler was in the left lane, the Checker cab was partly in the center lane and that the Buick was approaching the stopped cars from the rear, and that after the collision the Buick ended up along the left curb to the left of the cab.

The photographs admitted in evidence show that the Checker cab was hit in the left rear. The left rear portion of the bumper on the Checker cab had been pushed forward and dented. The rear of the left rear fender and part of the body to the left of the trunk had been struck and pushed forward. The Buick automobile, which was operated by Malone, came to rest to the left of the Checker cab. The front bumper of the Buick automobile

was about opposite the back of the left front wheel of the Checker cab, and the right part of the Buick's front bumper had been pushed back. The right front fender containing the right front headlight of the Buick had been pushed back a couple of feet, and a portion of it was disconnected from the frame. The hood of the Buick automobile does not appear in the photograph. Earl Gray testified that the hood of the Buick flew over his car onto the street at the time of the impact. Some of the photographs were taken while the cars were standing in the street, shortly after the accident and before the cars had been moved.

From the foregoing it is obvious that the Buick automobile driven by the defendant Malone, who was dismissed by the plaintiff, collided with the left rear of the Checker cab and then squeezed between the Checker cab and the left curb. Scratch marks and indents appear on the left side of the cab, indicating that after the cab was struck in the left rear the Buick driven by Malone forced its way between the cab and the north curb.

The testimony of the witnesses produced by the defendants, together with the photographs in evidence, clearly show that the verdict was contrary to the manifest weight of the evidence.

In Dick v. Swenson, 137 Ill. App. 68, 74, the court said:

> "When the verdict rests solely on the uncorroborated testimony of the plaintiff, contradicted by that of the defendant, whose testimony is corroborated by other witnesses, it cannot be sustained."

In Hickey v. Chicago Transit Authority, 52 Ill. App. 2d 132, the court pointed out that there were four witnesses who supported the driver's statement with respect to plaintiff's

intoxication and other details, and the plaintiff, alone, denied he was intoxicated. The verdict there was held to be against the manifest weight of the evidence. In this case we have the testimony of the driver of the cab supported by the two witnesses and photographs, establishing a basic issue in the case, namely, that the cab was hit in the rear by the oncoming Buick while the cab was stopped waiting for the light to change. Plaintiff, alone, contends that the cab was moving at the time of the accident, and that it was turning left and collided with two other cars. The verdict was against the manifest weight of the evidence.

For the foreoing reason the case must be reversed and remanded for a new trial. It would serve no useful purpose to pass upon the other questions raised by appellants in their brief, inasmuch as this case must be retried.

Judgment reversed and
cause remanded.

Schwartz, P.J., and Dempsey, JJ., concur.

Abstract only.

49708

PEOPLE OF THE STATE OF ILLINOIS,	54 I.A.2d 442	APPEAL FROM THE CIRCUIT
Appellee,		
vs.		COURT OF COOK COUNTY,
ALLEN PARKS,		CRIMINAL DIVISION.
Appellant.		

MR. PRESIDING JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

After a bench trial defendant was found guilty of armed robbery and sentenced to the penitentiary for a term of four to ten years. The only point raised on this appeal is that the State failed to establish defendant's guilt beyond a reasonable doubt.

We shall first outline the evidence presented by the State.

Herbert Jones testified that he was the sole night attendant at a gasoline service station at 37th and State Streets in Chicago. He had known defendant for three or four months as a customer who lived a block away and came to the station for service to his car several times a week. At about 3:30 A.M. on September 6, 1963, defendant appeared at the office of the station and said, "Give me the money." Jones thought he was "playing" until defendant "pulled a revolver out," whereupon, Jones gave defendant about $120 and he left. Jones called the police and two detectives came to the service station. In a 15-minute conversation Jones told them of the occurrence, described defendant, his car, and the approximate location of his residence. At about 4:30 A.M. the policemen returned with defendant and Jones accused him of having taken the money. Defendant denied it.

Lemon Works, a Police Officer for eleven years, assigned as a detective to the Robbery Division, testified that he received the robbery complaint on the night in question and interviewed Jones at the gas station. He corroborated Jones' description of this conversation. Works and his partner then patrolled the area

for about 45 minutes and found an automobile fitting the description given by Jones—a 1959 Mercury, maroon, with Missouri license plates. Examination of the car by the detectives disclosed that it had recently been driven, as it was still warm, but they did not search the car. Defendant was found in his apartment. He was placed under arrest and taken to the service station where he was identified by Jones.

Works further testified that defendant told him several different stories: first that he had been home all evening; then that he had just come in shortly before the police arrived; then that he had been at the gas station earlier in the evening and that Jones had given the money to his girl friend. With defendant furnishing a name and address, the policemen and defendant sought to locate the girl, but found no one living at that address under the name given by defendant. Jones denied knowing any such girl.

Works also testified that defendant then told him that he and Jones had been drinking at the station and that "the money was taken some kind of way." Works detected no smell of alcohol on Jones' breath. When the police searched defendant's room at the time of his arrest they found no gun and only about $45 which defendant told them belonged to a woman who was staying with him.

Earl Harvey, a witness for the defense, said that he knew both defendant and Jones; that he saw them and some other men at the service station between 2:00 and 3:00 A.M. drinking beer and wine; that both defendant and Jones were drunk.

Defendant's mother and father testified that the police had searched defendant's car and found nothing.

Defendant testified on his own behalf. He said he had known Jones for four years, having met him in school. Jones had been to his house and he to Jones' house. At about 6:30 P.M. on the evening

in question he had been drinking with Jones and others at the gas station. Defendant went home for a while about 8:00 P.M.; returned and drank some more till 9:00; went home again; then returned to the gas station for more to drink and stayed until he went home to stay at about 11:00 or 11:30. Five or six hours later policemen came to his home and searched him, his clothes, his house, and his car, and found $10.46. He took the police to the apartment of a girl who had been at the gas station when he had left, "but she wasn't home."

In conflict with the testimony of his witness Harvey, defendant said that the last time he had seen Harvey had been between 6:00 and 10:00 P.M. of the night in question. He also said he had not seen Jones after 10:30 P.M. Further, defendant testified that he had gone to school with Jones in 1948-9, and had seen him again in 1957 and 1958.

On the State's rebuttal it was stipulated that defendant had previously been convicted on three burglary counts and sentenced to 2 to 10 years.

Defendant cannot, and does not, contest the principle that the credibility of the witnesses is a matter for the trial judge. Thus defendant contends that his cause on this appeal is not harmed by the recorded statement of the trial judge to the effect that he did not believe a word of what defendant said on the witness stand.

Defendant does contend, however, that the State's evidence, standing alone, failed to prove defendant's guilt beyond a reasonable doubt. In this he relies principally upon People v. Dawson, 22 Ill. 2d 260, 264, where it was said by Justice Klingbiel:

> The finding of the trial judge as to the credibility of the witnesses is entitled to great weight. However, we cannot, in every case, accept the trial judge's finding as conclusive, for the rule is that it is the duty of this court to examine the evidence in a criminal case and if it is so unsatisfactory and unreasonable as to raise a serious doubt

> of defendant's guilt, the conviction must be reversed. (People v. Williams, 414 Ill. 414; People v. Buchholz, 363 Ill. 270.) The burden is always upon the State to prove the defendant guilty beyond a reasonable doubt and a judgment of conviction can be sustained only on credible evidence which removes all reasonable doubt of defendant's guilt. Where the State's evidence is improbable, unconvincing and contrary to human experience, we have not hesitated to reverse the judgments of conviction.

Defendant argues that a robbery by a person known to his victim, and thus subject to conclusive identification, is an act so "contrary to human experience" as to defeat conviction in the case at bar. We do not agree.

While we do, of course, concur in all that was said in the Dawson case, it is our conclusion that the judgment of the trial court is adequately supported by the evidence, and should, therefore, be affirmed.

AFFIRMED.

DRUCKER and McCORMICK, JJ., concur.

Publish abstract only.